

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION**

**JASON ORSA,
BRIAN MURPHY, and
LOUIS DANIELSON,**

Petitioners,

v.

CITY OF CHICAGO POLICE BOARD, *et al.*,

Respondents.

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) **11 CH 08166**
) **11CH 08424**
) **11 CH 19551**
) **(Consolidated)**
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ORDER

This matter comes to be heard on administrative review. Petitioners are police officers who have been disciplined by the Respondent Police Board. Jason Orsa and Brian Murphy have been terminated from their positions as Chicago police officers and Louis Danielson has been suspended for 180 days. These actions arise from an incident that occurred on March 24, 2006 at Taco Burrito King located at Higgins and Harlem in Chicago, Illinois. That part of the incident that occurred inside the Taco Burrito King was videotaped. The videotape was part of the evidence that the Board reviewed. There is no audiotape.

At about 4 a.m. Orsa, Murphy, another officer named Daniel McNamara, and Matt Walsh entered the Taco Burrito King to get something to eat. Walsh is a high school acquaintance of Murphy's who was home on leave from the United States Marine Corps. At Taco Burrito King orders for food are placed through a cashier who rings up the order and transmits the order to the cooks in the kitchen. The kitchen is an open area behind a counter. The customer then waits at the counter for his or her order. There are tables for customers who wish to eat their meal at the restaurant.

As the Petitioners were receiving their orders and taking a seat at a table near the back door a man by the name of Obed Deleon entered. He was wearing a baggy power-blue T-shirt and a ball cap that was cocked to the right. Deleon admitted that he was a member of the Spanish Cobras street gang. Members of the Spanish Cobras cock their hats to the right. Deleon did not get in line, but rather stood in an open area near the line and near where Petitioners were eating loudly complaining about some a--h--- who had parked a car blocking the driveway entrance to the Taco Burrito King parking lot. He walked over to the line of customers that had formed long enough to complain about the situation to two customers (Shawn Nelson and Joseph Mularczyk), but then quickly moved out of line and continued to loudly talk in an open area.

Apparently, Deleon was upset that he had to park his car somewhere other than the parking lot. After he parked his car, he walked through the lot to get to Taco Burrito King and noticed that some of the cars had FOP stickers on them.

There is a factual dispute as to what Deleon was saying. Deleon and the two customers to whom he complained testified that Deleon continued to complain about the owner of the car who blocked the driveway. Nelson and Mularczyk testified that Deleon kept referring to the owner of the car as an "a--h---."

Petitioners and Walsh, on the other hand, testified that Deleon began shouting at them as they were seated. Deleon said that he was a "cop killer" and a Spanish Cobra. They also testified that Deleon threatened to "cap" someone. Overall, Deleon made threats directed to them as they were trying to eat. Murphy was wearing his uniform pants and his gun was holstered. When Deleon first entered the restaurant, Murphy immediately moved to the table before picking up his food because he did not want Deleon to see that he was a police officer. Deleon continued to use obscenities and make threats. He began to hover around the table at which Petitioners were

seated along with McNamara and Walsh and directed his comments to the men. At that point, according to Murphy, he feared for his safety, drew his weapon, and attempted to subdue Deleon by pushing him against a wall. Once Murphy confirmed that Deleon did not have a weapon, he holstered his gun. Murphy also identified himself as a police officer and pulled out his star.

A fight ensued between Murphy and Deleon. Orsa, Walsh, and McNamara came to Murphy's aid and Deleon was eventually held on the ground. A Taco Burrito King security guard also started to intervene, but did not get involved in subduing Deleon because Murphy had identified himself as a police officer. The security guard, Len Villareal, testified that he saw Murphy pull out his star at the same time he was identifying himself as a police officer.

The Chicago Police arrived shortly thereafter, including Danielson who was a sergeant at the time and Officer Bukowski who was one of the first officers to enter the Taco Burrito King. Sgt. Delahanty was the first sergeant on the scene and he is depicted in the videotape. All the responding officers were in uniform.

Officer Bukowski saw that Deleon was still kicking and thrashing about despite being held by the Petitioners. Officer Bukowski did not want Deleon to harm him and when he realized that Deleon would not calm down, Bukowski told Deleon that he would have to handcuff him even though Deleon was not under arrest. Deleon was screaming obscenities at Bukowski, including a statement that Deleon would "f--- [Bukowski's] mother to death", a statement that Bukowski clearly recalled because his mother had recently died of cancer. Deleon's actions and comments caused Bukowski a considerable amount of stress.

Deleon was eventually arrested along with Nelson and Mularczyk. Deleon testified that he suffered some soreness and bruising (which was not apparent on any photographs) as a result of the altercation.

Orsa and Murphy contend that their due process rights were violated as they were not charged with any misconduct until fifty-one (51) months after the incident. They also contend that the doctrine of *laches* applies. Petitioners also contend that Municipal Code section 2-57-070 and General Order 93-03 were violated, thereby entitling them to dismissal.

An investigation into this incident was opened a few days after the occurrence. As of March 29, 2006, the investigator assigned to the case had a copy of the videotape. On April 10, 2007, Murphy gave a statement. Also in April 2007 the investigator took statements from other officers who were on the scene. On May 3, 2007 a second statement was taken from Murphy. On June 29, 2007 a statement was taken from Orsa.

In June 2008 the investigator turned in the file and indicated, "investigation complete". In January 2009, the investigator received the file back and was told that additional work was to be completed. In October 2009, the investigator turned in the file and indicated, "investigation complete." Petitioners were not charged until July 2010 and the hearing was conducted throughout the fall and winter months of 2010.

Orsa and Murphy filed a Motion to Strike and Dismiss at the administrative level arguing that the four-year, three-month delay between the March 24, 2006 incident and the July 2010 suspensions required dismissal due to violations of the due process clause, *laches*, General Order 93-03, and Municipal Code 2-57-070. The Board rejected their arguments and denied their Motion to Strike and Dismiss.

A reviewing court may entertain questions of fact and questions of law on administrative review. When reviewing questions of fact, it is not the court's function to resolve factual inconsistencies or weigh the evidence to determine where the preponderance of the evidence lies. *Launius v. Board of Fire & Police Comm'rs*, 151 Ill. 2d 419 (1992). A reviewing court does not

reweigh the evidence or substitute its judgment for that of the agency. *Cinkus v. Stickney Mun. Officers Electoral Bd.*, 228 Ill. 2d 200, 210 (2008). The court must evaluate whether the administrative agency's factual determinations are against the manifest weight of the evidence—that is, whether the opposite conclusion is clearly evident. *Id.* Questions of law are afforded less deference and are to be reviewed under a *de novo* standard. *Swoope v. The Retirement Bd. of the Policeman's Annuity and Benefit Fund of the City of Chicago*, 752 N.E. 2d 505, 529 (1st Dist. 2001). An agency is, however, presumed to make informed judgments based on its experience and expertise and as such, substantial deference is given to its interpretation of a statute. *Id.*

“The Due Process Clause requires provisions of a hearing ‘at a meaningful time.’” *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 547 (1985). As noted by Justice Brennan, “Today the Court puts to rest any remaining debate over whether public employers must provide meaningful notice and hearing procedures before discharging an employee for cause. As the Court convincingly demonstrates, the employee’s right to fair notice and an opportunity to ‘present his side of the story’ before discharge is not a matter of legislative grace, but of ‘constitutional guarantee.’” *Id.*, at 541, 546, 551, Brennan, J concurring in part, dissenting in part. The due process clause also requires that the opportunity to be heard occur “at a meaningful time and in a meaningful manner”. *Lyon v. The Dep’t of Children and Family Services*, 209 Ill.2d 264, 277 (2004), quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

In this matter, the Board rejected Orsa and Murphy’s due process challenge on the grounds that they were complaining about the length of the investigation rather than the length of time it took to adjudicate the matter. (Findings p. 3). The Board found that this matter was therefore unlike the situations in *Lyon* and *Morgan v. Dep’t of Financial and Prof’l Reg.*, 374

Ill.App.3d 275 (1st Dist. 2007) where the lengthy delay concerned the adjudication of misconduct rather than the investigation.

The Board's finding, however, misses the point. The due process clause is not to be so narrowly construed so as to permit lengthy delays in investigations. "Due process is flexible and calls for such procedural protections as the particular situation demands." *Stull v. The Dep't of Children and Family Services*, 239 Ill.App.3d 325, 335 (5th Dist. 1992). It does not require a specific time frame in which to provide a hearing but requires a hearing at a meaningful time. *Id.* See also *Cavarretta v. The Dep't of Children and Family Services*, 277 Ill.App.3d 16, 25-26 (1996).

There has been legislative and administrative concern about the lengthy delays in these types of cases. The City Council passed Municipal Ordinance 2-57-070 which requires that the Independent Police Review Authority (IPRA) conclude the investigation within six months or report the reasons for not concluding it to the Mayor, the City Council, the complainant, and the officer. On the administrative side, Chicago Police Department General Order 93-03 requires prompt investigation, within thirty days. This deadline can be extended by request of the investigator.

The Superintendent essentially conceded both at the administrative level and at oral arguments here in court that the lengthy delay could not be explained. Though the Superintendent claims in a conclusory fashion that the case was complicated, the complexity of the case does not excuse such a delay. The Superintendent has never pointed to any facts which support his contention that the facts were so complicated that the delay was warranted. The Board itself, in adopting the Superintendent's argument on this point, made no factual findings

about the complexity of the case. Moreover, if this case was complicated for the Superintendent to prosecute, then it was complicated for the Petitioners to defend.

The log notes of the investigator reveal no explanation for the lengthy delay nor do the notes explain the reasons for the twenty-three requests for an extension. Moreover, the twenty-three extensions given to the investigator to complete additional work, even if the extensions were for more than thirty days, do not explain the lengthy delays between June 2008 (when the investigator initially indicated that the investigation was closed) and January 2009 (when the case was reassigned to the investigator) nor do they explain the lengthy delay between October 2009 (when the investigator closed the file for a second time) and July 2010 when the Petitioners were eventually charged.

The investigator obtained a copy of the videotape upon which the Superintendent heavily relied within days of the incident. The identities of Nelson and Mularczyk were immediately known to the investigator because they were arrested that morning and reports were filled out with their correct names and addresses.¹ The investigator also discerned the identity of the store manager who called 911 and the identity of two of the cooks within a short period of time. The investigation went dormant for months at a time. At one point, in June 2008, the investigator noted "investigation complete" and turned in her file. In January of 2009, the case file was returned to her to conduct additional work. In October of 2009, the investigator once again indicated that the investigation was complete, but Orsa and Murphy were not served with charges until July 2, 2010. There is absolutely no explanation as to reason for the delay between the time the investigation was finally closed and the charging date. Thus, given the Superintendent's concession and the administrative record, the Court finds that the delay was unreasonable.

¹ Neither Nelson nor Mularczyk used an alias or gave any false information.

The Board also makes short shrift of Orsa and Murphy's claims of prejudice with regard to the delay. The Board found, "The Respondents' alleged prejudice in this matter is speculative. For example, even if they were advised of the allegations within thirty days, could they really have tracked down any of the patrons in the Taco Burrito King? If they were notified of the allegations within sixty days, would the responding officers really have remembered the details (e.g. whether any of the officers mentioned they were Chicago police officers)?"

Additionally, the Board specifically found that Deleon did not threaten any of the respondents or anyone else in the restaurant. (Findings p. 7). The Board also credited the "disinterested and very compelling testimony" of Nelson and Mularczyk, "who testified that Mr. DeLeon did not act or speak in a threatening manner to anyone in the restaurant." (*Id.*) The Board specifically did not rely on the testimony of Deleon (Findings p. 8). The Board also found that Murphy and Orsa had made false reports with regard to the statements of Deleon. The Board found that Murphy had unlawfully and/or unnecessarily used and/or displayed his weapon. The Board found that Murphy and Orsa had engaged in an unjustified and verbal or physical altercation. In short, the Board accepted the testimony of Nelson and Mularczyk in making its findings.

The Court has reviewed the videotape numerous times and has reviewed the record, including the transcript of proceedings. The delay herein substantially and actually prejudiced Orsa and Murphy.

The videotape and other evidence clearly support Murphy and Orsa and their witnesses' recollection of events. Though the Superintendent claims that the Board correctly credited the testimony of Nelson and Mularczyk as to what Deleon was saying and doing, the videotape does not support the testimony of Nelson and Mularczyk.

Deleon entered the Taco Burrito King with no intention of getting something to eat. Instead of getting in line, he stood in an open area by the Plaintiffs' table and began yelling. He briefly walked over to Nelson and Mularczyk and said something to them, but he did not remain in line to place an order. Instead, he walked back near Plaintiffs' table and kept carrying on. At one point he flashed gang signs. He also hovered over Plaintiffs' table and said something to those seated there. His manner was aggressive. He was also wearing a baggy T-shirt and kept his right hand in his pocket for the most part, thereby suggesting that he was armed.

Thus, the videotape corroborates the testimony that Deleon was threatening to "cap" somebody, yelling "Cobra Love" and other gang slogans; yelling "cop killer", "f--- the police"; and generally making statements designed to provoke and inflame the officers. Deleon admitted that he told the OPS investigator that, as he walked through the parking lot on the way into the restaurant, he noticed the FOP stickers on the backs of some cars. Murphy testified that he was wearing his uniform cargo pants and his gun was in its holster. Given Murphy's attire, it would have been easy for anyone to see that he was an officer. The videotape confirms Murphy's testimony that he was concerned that Deleon would notice his attire because the tape shows that he sat down without getting his food order.

Though the Superintendent argues that the other customers were not alarmed by Deleon, the videotape does not support this contention. Instead, some customers were pointedly ignoring Deleon. At one point a man in a gray sweatshirt leaves his chair in an apparent attempt to confront Deleon. It is apparent from the tape that Deleon was trying to provoke a reaction and focused on the Petitioners. No one came to Deleon's defense, a fact which supports the Petitioners' contention that the other customers were alarmed by Deleon's actions, not the

officers' reactions. Even Nelson, who the Board found to be a credible witness, testified that a couple of people reacted to Deleon by turning and looking at him and speaking to him.

Moreover, despite Deleon's protest that he was no longer a Spanish Cobra, he wore his ball cap cocked to the right and he admitted that the Cobras wear their ball caps in that fashion. He had three tattoos which evidenced his participation in the gang. During his testimony, he tried to downplay the Spanish Cobras as merely "a group of people from the neighborhood where [he] grew up." He also testified that he did not "see" the Spanish Cobras as a street gang as whether they are a street gangs "[d]epends on what's (sic) your perspective". These obvious lies corroborate the Petitioners' case, not the Superintendent's.

Moreover, Deleon's credibility was severely impeached. He had four felony convictions at the time he testified. Three of the felonies were for possession of a controlled substance and the fourth was for aggravated battery to a police officer. Overall, Deleon's testimony was evasive, impeached, and inherently incredible. Though the Board did not rely on Deleon's testimony, it should have considered it to the extent that it corroborated the Petitioners' case.

Deleon continued to act in an aggressive and profane matter toward others after the physical altercation, a fact which also corroborates the Petitioners' case. Bukowski testified that Deleon made many profane, abusive comments to Bukowski, including the highly abusive, profane, and inflammatory comment that he "would f--- [Bukowski's] mother to death". In short, the evidence establishes that Deleon was a violent, profane, and dangerous individual who fought, kicked, and lashed out at men he knew to be armed law enforcement officers.

The Superintendent basically echoes the Board's dismissal of the Plaintiffs' complaints about the delay by arguing that their position that "counter evidence" could be found is

speculative. (Resp. p. 19). However, evidence that patrons of the restaurant could have easily been found had the charges been brought in a timely fashion is present on the videotape.

The tape shows two men wearing Cubs ball caps with the bills in facing backwards placing an order about the same time that Deleon entered Taco Burrito King. The men are together. One of the men paid for both orders with a credit card and he signed the credit card slip. After paying, they stepped to the side, leaned up against the kitchen counter, and turned to watch while Deleon was yelling. They also watched the beginning of the physical altercation. They then ran into the vestibule by the front door and watched from behind the glass entrance door. After the altercation ended, they went back to the counter and waited for their food.

These patrons could easily have been witnesses favorable to Murphy and Orsa given their close proximity to the occurrence and the aftermath. They were in a position to both hear and see what was occurring. It is apparent from the videotape that they were paying attention to what was occurring. Had the Superintendent brought these charges in a timely fashion, Murphy and Orsa could have subpoenaed Taco Burrito King to produce any and all credit card receipts during the relevant time period. Plaintiffs could have tracked these patrons through the credit card slip and interviewed them at a time when they had a fresh memory about the occurrence. Needless to say, even if Murphy and Orsa had successfully tracked them down in 2010, their testimony of what occurred would have been subject to attack because they would have been testifying about matters that occurred many years before. It is also probable that these witnesses would not have had a good recollection of what occurred or what was said.

Moreover, a witness named Jennifer Kamieniak called 911 to report the incident as she and her friends were eyewitnesses to the event. When the IPRA investigator went to speak to her, she indicated that she did not want to give a statement to IPRA nor did she want to give the

names and/or contact information of her friends. Though these non-answers were acceptable to IPRA, had Petitioners been charged in a timely fashion, their investigator may have been able to get information. The fact that Kamiński did not wish to deal with IPRA does not mean that she did not wish to deal with the defense. The fifty-one month delay hampered any ability to get reliable statements from Kamiński and her friends.

Petitioners were also deprived of the testimony of Sergeant Delahanty who was one of the first officers on the scene and who is depicted in the videotape. The IPRA investigator did not even attempt to schedule his interview until November 2007, one and one-half years after the incident. Ultimately, she was not able to obtain a statement because he had retired. Thus, no substantially contemporaneous interview with Delahanty exists. Had Petitioners been able to track Delahanty down in 2010, they would have been hampered in any ability to get a reliable statement from him given the inordinate delay.

Thus, the Superintendent's position (and the Board's finding) that witnesses could not be located is not supported by the evidence. Moreover, other patrons may have paid with a debit or credit card, thereby allowing the parties to discover who else may have been present at the relevant time; however, any testimony by these witnesses would also be subject to the same attack as the customers in the Cubs ball caps.

Also, Murphy testified that he identified himself as a Chicago police officer. The security officer for Taco Burrito King, Villareal, corroborated this testimony. Villareal did not see the events or hear Deleon's comments leading up to the physical altercation because he was at the front of the restaurant trying to prevent another fight that was breaking out at the front. However, he saw that when Murphy pulled his gun, he also pulled a badge. When Villareal went

to investigate, Murphy stated "I am a police officer". Villareal then "backed off". The videotape corroborates Villareal's testimony.

Nelson and Mularczyk were not disinterested witnesses. Both were arrested and both believed that they had been unfairly arrested. Any bias they had would have been against the Petitioners. Mularczyk explored the option of suing. Moreover, their testimony was contradicted by other witnesses and the videotape.

Nelson claimed that when Deleon entered the restaurant he "seemed relaxed" and that he was not obnoxious. However, the video clearly shows that Deleon is pacing, not getting in line to order food, flashing gang signs, and hovering over Plaintiffs' table. Nelson also testified that Deleon used the word a---h--- to describe the driver of the car who blocked the entrance, a word which contradicts Nelson's own testimony that Deleon was not obnoxious. Though Nelson claims that Deleon was not speaking loudly, he admitted that Deleon was speaking loudly enough that everyone in the restaurant could hear what Deleon was saying. Also, Nelson testified that Deleon may have said things that he did not hear. Indeed, even Deleon admitted entering the restaurant and demanding to know, "Who is the a---h--- blocking the lot?"

Nelson also testified that after Deleon ended up on the ground it appeared that he "gave up" or was unconscious. Nelson also claimed that Deleon was not kicking anyone when he was down on the ground. However, Nelson admitted that at one point while he was in the kitchen his view was obstructed. Moreover, both Bukowski and Villareal testified that Deleon continued to try to fight and kick while he was on the ground. Bukowski had to handcuff Deleon because Bukowski feared for his own safety given how Deleon was trying to strike out at people.

Nelson was also impeached by a statement he gave to the investigator. In that statement, Nelson never indicated that he saw any of the individuals kick Deleon even though at the hearing he claimed to have seen Deleon being kicked.

Mularczyk's testimony suffered from many of the same deficiencies as Nelson's. He indicated that Deleon was talking in a "conversational" tone of voice and that he was also speaking in an "inquisitive" voice, testimony that is clearly contradicted by Deleon's actions as portrayed on the tape, the other patrons' reactions, Nelson, Petitioners, and Petitioners' witnesses. Mularczyk admits that when he was in the kitchen he could not see what was occurring for about one minute. Given that the fight lasted less than one minute, Mularczyk did not see much of what occurred.

In any event, the testimony of Mularczyk and Nelson contradicts the testimony of Petitioners and their witnesses.

In short, the unreasonable delay substantially and actually prejudiced Orsa and Murphy. This is a close case because of conflicting testimony and for other reasons. The videotape does not have any sound so the Board had to rely on witness recollection to determine what was said. The lengthy delay stopped Murphy and Orsa from investigating and possibly finding independent witnesses inside the Taco Burrito King who had a good recollection of what occurred. It also stopped them from being able to independently interview the responding officers who would have had a good recollection of the incident immediately after it occurred. Interviewing these officers years after the fact was essentially useless because the officers would have made many arrests and been involved in many incidences since this incident, the exception to this being Bukowski. One of the reasons that Bukowski had a good recollection was due to the fact that Deleon had made foul and disgusting comments about Bukowski's mother (who

recently had died of cancer). However, none of the other officers appears to have been involved to the extent that they would have remembered this incident to any great degree of certainty.

The Board did not give any weight to the strong legislative and administrative judgment that charges should be brought in a timely fashion. The Board looked at the Municipal Code, section 2-57-070 and rejected Petitioners' arguments on the grounds that this section was not retroactive because it did become effective until July 19, 2007. The Board also found that the section did not require dismissal as a remedy even if it was violated. The Board also rejected Petitioners' reliance on General Order 93-03 and found that the requests for extension were justified because the case was complicated (without citing any facts as to what made this case so complicated).

The Board's findings miss the point. Even if section 2-57-070 is not retroactive and even it does not state that the remedy for a violation is dismissal, the time constraints in this section reflect the judgment of the legislature as to what constitutes a reasonable length of time in which IPRA must complete an investigation. General Order 93-03 reflects the judgment of the agency as to what constitutes a reasonable length of time in which IPRA must complete an investigation.

Both the Code provision and the General Order are particularly strongly worded. Under the Code, if the investigation is not complete within six months the Chief Administrator of IPRA must explain the reasons for not concluding the investigation to the executive branch (the Mayor of the City of Chicago), the legislative branch (the City Council), the complainant, and the officer. It is apparent from the language of the ordinance that the City Council was extremely concerned about the effect of lengthy delays on the officer's ability to defend himself or herself because the officer is one of the people to whom the Chief Administrator must give an explanation as to the reason for the delay. General Order 93-03 also is concerned by the effect of

delayed investigations on the ability of the officer to defend himself or herself because it demands "prompt, thorough investigations [that] will be conducted into allegations of misconduct, [in order to] establish facts which absolve the innocent and identify the guilty." Given these strong legislative and administrative pronouncements, Petitioners' procedural due process rights were violated when the time constraints were egregiously ignored. *Cavarretta*, 277 Ill.App.3d at 25-26.

The doctrine of *laches* also applies. A suit is barred by laches where there is: (1) conduct on the part of the defendant giving rise to the situation of which complaint is made and for which the plaintiff seeks a remedy; (2) delay in asserting the plaintiff's rights, the plaintiff having had notice or knowledge of defendant's conduct and the opportunity to institute a suit; (3) lack of knowledge or notice on the part of the defendant that the plaintiff would assert the right on which plaintiff bases the suit; and (4) injury or prejudice to the defendant in the event relief is accorded to the plaintiff. *O'Brien v. Meyer*, 281 Ill. App. 3d 832, 838 (1st Dist. 1996). This doctrine has been applied to administrative actions. *Mank v. The Board of Fire and Police Commissioners*, 7 Ill.App.3d 478, 485-86 (5th Dist. 1972).

The *Mank* opinion is particularly instructive. In *Mank* the charges were filed from 39 to 44 months after the incidents occurred. *Id.* There was conflicting testimony as to what occurred and the testimony depended upon recollection. *Id.* Several witnesses were not available. *Id.* The appellate court found, "The length of time above would be sufficient to cause prejudice where the factual dispute is solely dependent on recollection." *Id.*

This matter is similar as the length of time for charging is 51 months; there was conflicting testimony; and the testimony depended upon recollection. As noted above, several witnesses could easily have been traced if the charges were brought in a timely fashion. Though

the parties here have the benefit of the videotape, there is no audiotape. What was said is a crucial issue towards resolution of this matter. As detailed above, the lengthy delay prejudiced Murphy and Orsa because it deprived them of the ability to locate and call witnesses. Moreover, the Superintendent cannot take contrary positions, i.e. that the delay was necessitated by the complexity of the situation, but that the videotape is all that is necessary to resolve the issues. No trier of fact could reach a fair conclusion because the evidence in this case has been obscured. *Id.*

Though some of the charges arise from Murphy and Orsa's failure to submit a Tactical Response Report after the incident, the lengthy delay contributed to prejudicing any defense that they might have for those charges. Murphy and Orsa were separated from the Department as a result of all of the charges. Even if Murphy and Orsa were to have been found to have violated their duties by failing to submit a TRR, the penalty for their failure to submit a TRR may have been vastly different had the Board concluded that their actions in Taco Burrito King were justified.

Moreover, as the appellate court noted in *Mank*, *laches* may arise where the conditions have so changed as to make enforcement of the alleged right inequitable. *Id.* During the period of delay, both Murphy and Orsa continued to serve the Chicago Police Department and the citizens of Chicago honorably and without charges of any misconduct. The Department continued to rely on their efforts as neither was assigned to desk duty or minor tasks during the period of delay. Certainly, had the Superintendent reasonably thought that Murphy and Orsa were dangerous or so lacking in ability that they needed to be terminated from working for the Department, action would have been taken sooner.

Danielson raises some different issues. Danielson was charged with violating Rules 2 and 10 of the Chicago Police Department's Rules of Conduct. The Superintendent sought a 60 day

suspension. Rule 2 prohibits bringing discredit upon the Department and Rule 10 prohibits inattention to duty. The specifications for each violation state that Danielson "failed to conduct a thorough preliminary investigation of the incident inside the Taco Burrito King". The Board's Findings and Decision, however, states that he violated Rules 2 and 10 because he failed to supervise his subordinates and make sure they conducted a thorough preliminary investigation. (Findings p. 35). He was also found guilty because of a failure of "leadership" on his part. Finally, he was suspended for a period of 180 days.

Though the Court does not expect that the charges will be drawn with the same precision required of pleadings in a judicial action (*see generally, Morgan*, 388 Ill.2d 633), Danielson was entitled to be reasonably apprised of the case against him so as to be able to intelligently prepare his defense. A review of the record shows that Danielson prepared his defense on the premise that he was being called upon to answer charges of failing to conduct a thorough preliminary investigation rather than failing to supervise his subordinates.

The Court would note the irony of the Superintendent's position regarding Danielson's actions vis-à-vis this entire case. Obviously, the basis of charges that a thorough preliminary investigation has not been conducted rests on the premise that a thorough preliminary (*i.e.* timely and contemporaneous) investigation is needed to identify witnesses and gather information so that the truth of what occurred can be ascertained. Here, the Superintendent sought a suspension of Danielson for failing to conduct a thorough preliminary investigation while at the same time taking the position that Murphy and Orsa should not be heard to complain that their rights were violated because the inordinate delay stopped them from conducting a thorough, timely, and contemporaneous investigation into matters which could have aided their defense.

Finally, the Board's finding of guilty to the charge of a failure to supervise the preliminary investigation is contrary to the manifest weight of the evidence. The first supervisor on the scene was Delahanty. Delahanty and Officer Babich entered the restaurant after Bukowski to assist him with Deleon, who was still struggling. Bukowski turned over Deleon, Nelson, and Mularczyk over to Delahanty and Babich. Bukowski transported Walsh to the station to sign complaints and was going to leave thereafter to attend a scheduled weapons qualification course. Delahanty, however, instructed Bukowski that he was not to leave and assigned Bukowski to prepare the case report.

It is clear from these facts that Delahanty was the supervising officer, not Danielson. Delahanty directed the officers with regard to the procedures to follow on the scene, not Danielson. Given Delahanty's actions, Danielson could easily have reasonably believed that Delahanty was the supervising officer, not him. Finding an officer guilty and suspending him for six months based on that officer's reasonable interpretation of the facts and circumstances is against the manifest weight of the evidence.

The decision of the Board is reversed as to all Petitioners.

This is a final Order disposing of all matters in this litigation.

DATE: March 1, 2012

